New Jersey Law Journal

VOL. CLXXXVII – NO. 12– INDEX 1056 MARCH 19, 2007 ESTABLISHED 1878

Quotations Are a Spice, Not the Main Course

Prefer your own words to those of others

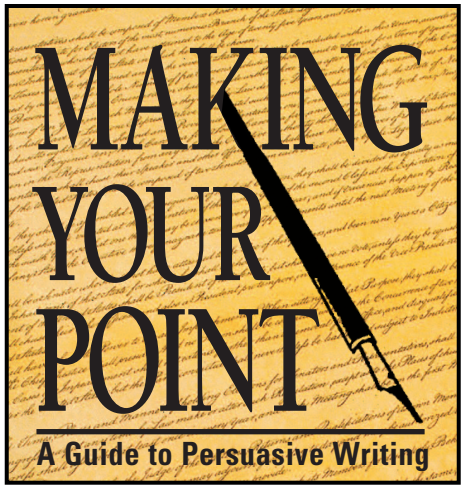
By Kenneth F. Oettle

Do you remember TV dinners? Well, maybe not. Swanson cooked and froze them; you reheated them in the oven; and then you took them into the room with the console TV. The only mental effort needed was the decision whether to have beef with brown gravy, meatloaf, fried chicken, turkey with stuffing, or fish.

In the hands of some lawyers, quotations from judicial opinions are the TV dinners of brief writing. They are prepackaged prose. Writers often use quotations to avoid the hard work of formulating a message in their own words. They quote where they should paraphrase, mistaking the court's pedigree for a point. Quotations can have an insidious allure.

Consider the following judicial quotation embedded in a description of a statute of limitations and a statute of repose:

> A statute of limitations computes the period of time within which an action must be commenced from the accrual of the cause of action. A statute of repose, on the other hand, operates without regard to the accrual of the cause of action. A statute of repose "does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action from ever arising." [Citation omitted].



The paragraph correctly states that a statute of limitations sets a time within which an action must be brought. (The writer mis-selected "computes" instead of "sets" from his mental drop-down menu.) The explanation assumes, not unreasonably, that the reader understands that a cause of action does not accrue until the injury is discovered (the Discovery Rule).

The passage doesn't do as well with the statute of repose, for which the writer relied on a confusing statement from a judicial opinion:

> A statute of repose "does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action from ever arising."

The statement that a statute of repose "does not bar" a cause of action is misleading because statutes of repose, like statutes of limitations, bar lawsuits. "Does not bar" seems to be the opposite of what statutes of repose do.

The second part of the quotation is likewise misleading because it says that the purpose of a statute of repose is to "prevent" a cause of action from arising. The concept of prevention looks forward, whereas statutes that set time limits for bringing an action look backward over the expired time.

Because I couldn't understand this description, I couldn't redline it. Instead, I asked the writer to say in his own words what a statute of repose does. The result was a nice rewrite that, as a bonus, refined the explanation of a statute of limitations. The description is in the context of a construction case:

> The statute of limitations limits the time within which a party can file a law suit or claim after that party has discovered injury or deficiency. A statute of repose, on the other hand, sets a time limit within which a party can file a lawsuit or claim following substantial completion of construction and operates without regard to the discovery of the injury or deficiency.

Now we see that a statute of repose

The author is a partner and co-chair of the writing and mentor programs at Sills Cummis Epstein & Gross. He invites questions and suggestions for future columns to koettle@sillscummis.com. "Making Your Point" appears every other week.

caps the time within which a cause of action can be brought, regardless of when the injured person becomes aware of the injury.

The writer adapted well. I didn't impose a directive or even make a suggestion, merely a request. This reaffirms the refreshing realization that assigning attorneys can obtain good results with nonspecific comments such as, "I can't understand this," or "Could you put this in your own words?"

Success in this approach may vary with the subject matter and the skills of the writer, but the light touch works more often than heavy redliners might think. Where it doesn't produce results, the writer's inability to respond may simply reflect a steeper learning curve that, with extra assistance, can be traversed.

Beginning Paragraphs with Quotations

Confusion isn't the only downside of over-reliance on quotations. Writers can lose credibility and control, particularly where they use quotations to begin paragraphs, as in the following quotation that opened a discussion of minority shareholder oppression:

> "Oppression has been defined as frustrating a shareholder's reasonable expectations."

The statement is true, but it gives ground in several ways: (1) it begins the paragraph with a warm-up rather than a point; (2) being definitional, it strays from the plaintiff's pain; (3) it is limp because "reasonable expectations" sounds like a mere contract claim; and, perhaps most importantly, (4) it is someone else's words, not the writer's. This suggests that the writer cannot find the words to make a case, and if the writer cannot find the words, then maybe the writer doesn't have a case. (This suggests in turn that in some instances, just removing the quotation marks can help measurably.)

The first sentence of a paragraph is where you take control; you take control by stating your point in your own words. Writers rationalize that quotations add weight, but they may have the opposite effect, suggesting to the reader that the writer doesn't have enough confidence in, or control of, the point to state it in the writer's own words.

Inexperienced writers rely heavily on what judges say because judges tend to be smart, knowledgeable and experienced; their reasoning seems logical; and their opinions have an aura of importance. After all, judicial opinions are the bedrock of the law, the building blocks of stare decisis ("the decision must stand"). Writers may feel they can't go wrong by quoting a court.

But writers have to be advocates. If you want to be taken seriously, you have to embrace a position and assert it in your own words. Show strength by taking control.

Puzzler

Would you move "only" in the following sentence?

> A gambling device can only be deemed contraband if it is illegally possessed or if it is used in illegal gambling.

"Only" almost always belongs as close as possible to what it limits. Here, the writer is saying, but does not mean, that an illegally possessed or illegally used gambling device can be deemed contraband and nothing else (it can "only be deemed contraband"). The writer meant that the device can be deemed contraband only under specified conditions. Therefore, the sentence should have read:

> A gambling device can be deemed contraband only if it is illegally possessed or if it is used in illegal gambling. ■